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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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KENNETH R. CALIHAN,

Plaintiff,

v.

GARRETT AUSTIN SLOINKER, et al.,

Defendants.

Case No. [19-cv-07645-EMC](#)

**ORDER OF DISMISSAL WITH LEAVE  
TO AMEND**

Docket No. 1

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**I. INTRODUCTION**

Kenneth R. Calihan, an inmate at the Santa Clara County Jail, filed this *pro se* civil rights action under 42 U.S.C. § 1983. His complaint is now before the court for review under 28 U.S.C. § 1915A. This order requires Mr. Calihan to file an amended complaint to correct several pleading deficiencies.

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**II. BACKGROUND**

Mr. Calihan alleges that San Jose police officers Sloinker and Barrera “filed false charges” against him on August 30, 2019, and presented false information to the district attorney. Docket No. 1 at 3. This allegedly resulted in Mr. Calihan being stabbed by another inmate a couple of weeks later. *Id.* He also alleges that he expects the pending criminal charges to be dismissed. *Id.*

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**III. DISCUSSION**

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A federal court must engage in a preliminary screening of any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *See id.* at

1       § 1915A(b)(1),(2). *Pro se* pleadings must be liberally construed. *See Balistreri v. Pacifica Police*  
2       *Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

3           To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that a  
4       right secured by the Constitution or laws of the United States was violated, and (2) that the  
5       violation was committed by a person acting under the color of state law. *See West v. Atkins*, 487  
6       U.S. 42, 48 (1988).

7           Although a complaint “does not need detailed factual allegations, . . . a plaintiff’s  
8       obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and  
9       conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual  
10       allegations must be enough to raise a right to relief above the speculative level.” *Bell Atlantic*  
11       *Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). A complaint must proffer  
12       “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570.

13           The complaint has several problems. Leave to amend is granted so that Mr. Calihan may  
14       file an amended complaint that cures the deficiencies identified in this order.

15           The complaint fails to state a claim based on allegations that two police officers filed false  
16       charges against him. He fails to identify the particular way in which the charges were false. To  
17       prevail on a § 1983 claim of deliberate fabrication of evidence, “a plaintiff must prove that (1) the  
18       defendant official deliberately fabricated evidence and (2) the deliberate fabrication caused the  
19       plaintiff’s deprivation of liberty.” *Caldwell v. City and County of San Francisco*, 889 F.3d 1105,  
20       1115 (9th Cir. 2018).

21           More significantly, it appears that Mr. Calihan’s claim might be barred by the *Heck* rule.  
22       In *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), the Supreme Court held that a plaintiff cannot  
23       bring a civil rights action for damages for a wrongful conviction or imprisonment, or for other  
24       harm caused by actions whose unlawfulness would render a conviction or sentence invalid, unless  
25       that conviction or sentence or other decision already has been determined to be wrongful. *See*  
26       *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). A conviction or sentence may be determined to  
27       be wrongful by, for example, being reversed on appeal or being set aside when a state or federal  
28       court issues a writ of habeas corpus. *See id.* The *Heck* rule also prevents a person from bringing

1 an action that—even if it does not directly challenge the conviction or other decision—would imply  
2 that the conviction or other decision was invalid. The practical importance of the *Heck* rule is that  
3 plaintiffs cannot attack their convictions or sentences in a civil rights action for damages and  
4 instead must have successfully attacked the decision before filing the civil rights action for  
5 damages. The *Heck* rule requires dismissal of a case where the conviction has occurred. When  
6 the action is brought by a pretrial detainee and the criminal proceedings are still pending, the  
7 action will be stayed rather than dismissed if it would, if successful, “impugn an anticipated future  
8 conviction.” *Wallace v. Kato*, 549 U.S. 384, 393-94 (2007).

9 Here, it appears that Mr. Calihan is in custody as a result of the very criminal charges that  
10 he alleges are false. It may be that success on Mr. Calihan’s § 1983 claims would, if successful,  
11 call into question an existing or future conviction. The complaint is dismissed with leave to  
12 amend so that Mr. Calihan can provide some information necessary for the Court to determine  
13 whether there is a *Heck* problem in this case. In his amended complaint, Mr. Calihan list the  
14 criminal charges that were filed against him by officers Sloinker and Barrera. He also must  
15 explain the status of those charges, e.g., whether the charges are still pending, have resulted in a  
16 conviction, or have been dismissed. Mr. Calihan also must describe the statements in the report by  
17 officers Sloinker and Barrera that were false. He also should provide any other factual  
18 information he can think of to explain why the claim that the officers filed false charges should not  
19 be stayed or dismissed under the *Heck* rule.

20 The other claim in the complaint appears to be that Mr. Calihan was stabbed in jail. Mr.  
21 Calihan alleges that this stabbing was the result of the false charges filed against him by the police  
22 officers – apparently on the theory that, because their actions caused him to be jailed, they are  
23 liable for all bad things that eventually happen to him in jail. However, there must be a closer  
24 causal connection between alleged wrongdoing and injury than simply that the defendant caused  
25 the plaintiff to be put in a jail where the plaintiff was later injured. “In a § 1983 action, the  
26 plaintiff must . . . demonstrate that the defendant’s conduct was the actionable cause of the  
27 claimed injury. To meet this causation requirement, the plaintiff must establish both causation-in-  
28 fact and proximate causation.” *Harper v. City of Los Angeles*, 533 F.3d 1010, 1026 (9th Cir.

1 2008). Mr. Calihan must allege facts showing what defendants did or failed to do that caused him  
2 to be stabbed, beyond merely filing false charges that led to him being put in the jail where the  
3 stabbing occurred.

4 If Mr. Calihan believes that the stabbing occurred as the result of the conduct of some jail  
5 official(s), he may name the jail official(s) whose acts or inactions caused him to be stabbed. To  
6 state a claim that an individual official failed to protect a pretrial detainee, a plaintiff must allege  
7 facts showing these elements:

8 (1) The defendant made an intentional decision with respect to the  
9 conditions under which the plaintiff was confined; (2) Those  
10 conditions put the plaintiff at substantial risk of suffering serious  
11 harm; (3) The defendant did not take reasonable available measures  
12 to abate that risk, even though a reasonable officer in the  
circumstances would have appreciated the high degree of risk  
involved—making the consequences of the defendant's conduct  
obvious; and (4) By not taking such measures, the defendant caused  
the plaintiff's injuries.

13 *Castro v. County of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc), *cert. denied*, 137  
14 S. Ct. 831 (2017).

15 The complaint also lists the San Jose Police Department as a defendant but makes no  
16 allegations against that entity. Mr. Calihan cannot hold a municipal entity liable simply because it  
17 employs the individual wrongdoers. There is no respondeat superior liability under § 1983, i.e. no  
18 liability under the theory that one is responsible for the actions or omissions of another, such as an  
19 employee. *See Board of Cty. Comm'rs. of Bryan Cty. v. Brown*, 520 U.S. 397, 403 (1997); *Tsao v.*  
20 *Desert Palace, Inc.*, 698 F.3d 1128, 1139, 1144 (9th Cir. 2012). Thus, a claim would not be stated  
21 against a city or a city's police department merely because that entity employed the alleged  
22 wrongdoers.

23 Local governments, such as the City of San Jose, are “persons” subject to liability under 42  
24 U.S.C. § 1983 where official policy or custom causes a constitutional tort. *See Monell v. Dep't of*  
25 *Social Servs.*, 436 U.S. 658, 690 (1978). To impose municipal liability under § 1983 for a  
26 violation of constitutional rights, a plaintiff must show: “(1) that [the plaintiff] possessed a  
27 constitutional right of which [he] was deprived; (2) that the municipality had a policy; (3) that this  
28 policy amounts to deliberate indifference to the plaintiff's constitutional right; and (4) that the

1 policy is the moving force behind the constitutional violation.” *See Plumeau v. School Dist. #40*  
2 *County of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997) (citations and internal quotation marks  
3 omitted). For municipal liability, a plaintiff must plead sufficient facts regarding the specific  
4 nature of the alleged policy, custom or practice to allow the defendant to effectively defend itself,  
5 and these facts must plausibly suggest that the plaintiff is entitled to relief. *See AE v. County of*  
6 *Tulare*, 666 F.3d 631, 636-37 (9th Cir. 2012). It is not sufficient to merely allege that a policy,  
7 custom or practice existed or that individual officers’ wrongdoing conformed to a policy, custom  
8 or practice. *See id.* at 636-68. Leave to amend is granted so that Mr. Calihan may attempt to  
9 allege a *Monell* claim against the San Jose Police Department or City of San Jose. He must be  
10 careful to allege the specific policy, custom or practices of each municipal entity that he contends  
11 give rise to liability.

12 **IV. CONCLUSION**

13 The complaint is dismissed with leave to amend. Plaintiff must file an amended complaint  
14 that complies with the directions in this order no later than **March 13, 2020**, and must include the  
15 caption and civil case number used in this order and the words **AMENDED COMPLAINT** on the  
16 first page. Plaintiff is cautioned that his amended complaint must be a complete statement of his  
17 claims, except that he may not repeat claims the court has dismissed without leave to amend and  
18 may not repeat allegations against defendants the court has dismissed from this action. *See Lacey*  
19 *v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012) (en banc) (“For claims dismissed with  
20 prejudice and without leave to amend, we will not require that they be replied in a subsequent  
21 amended complaint to preserve them for appeal. But for any claims voluntarily dismissed, we will  
22 consider those claims to be waived if not replied.”) Failure to file the amended complaint will  
23 result in the dismissal of this action.

24 **IT IS SO ORDERED.**

25 Dated: February 13, 2020

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EDWARD M. CHEN  
United States District Judge